Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

JOHN E. SHOOP
Prosecuting Attorney for the State of Ohio
Lake County Court House
Painesville, Ohio 44077
(216) 352-6281
Attorney for Petitioner

MARVIN R. PLASCO
301 Parkhill Professional Building
35100 Euclid Avenue, No. 301
Willoughby, Ohio 44094
(216) 951-8111
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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OPINIONS BELOW

The opinion and judgment of the court below giving rise to this petition are as follows:

State of Ohio v. Roberts, 55 Ohio St. 2d 191, 378 N.E.2d 492, ... Ohio Ops. ..... (1978)

A copy of said opinion is appended.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of Ohio herein was rendered July 19, 1978. No motion for a rehearing was filed.

This court has jurisdiction to review this matter upon certiorari pursuant to 28 U.S.C., Section 1257(3), in that the validity of Section 2945.49, Ohio Revised Code, has been drawn into question on the ground that it is repugnant to the Sixth Amendment to the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

Where a witness, called by a criminal defendant at a preliminary hearing, testifies in a manner incriminating the defendant and was not cross-examined although there was opportunity to do so, is later shown to be unavailable to testify at the trial of the same defendant on the same charge, does the confrontation clause of the Sixth Amendment to the Constitution of the United States preclude the State's use of the witness' recorded testimony?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49, Ohio Revised Code

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

STATEMENT OF THE CASE

The facts underlying this case which are germane to this appeal are as follows:

The defendant, Herschel Roberts, was arrested in Lake County, Ohio, on January 7, 1975, and charged with forgery. Later, additional charges of receiving and concealing stolen property and possession of heroin were brought.

Shortly after defendant's arrest, a preliminary hearing was held in which witnesses were called both by the State of Ohio and by the defendant. One of the witnesses *called on behalf of the defendant,* Anita Isaacs, testified in such a manner that incriminated the defendant. Counsel for defendant had, but did not exercise, an opportunity to declare her a hostile witness and cross-examine. At the conclusion of said preliminary hearing, the defendant was bound over to the Lake County Common Pleas Court.

Numerous trial dates were set in Common Pleas Court. As a result of continuances all occasioned on the part

of the defendant and his leaving the jurisdiction, however, trial was not held until March 4, 1976.

During defendant's March 4, 1976 trial, the State of Ohio offered as evidence, and the Court admitted over defendant's objections, a transcript of Anita Isaac's preliminary hearing testimony, admissible pursuant to Section 2945.49 of the Ohio Revised Code, the witness Anita Isaacs being an unavailable witness pursuant to said Section.

Prior to the admission of the recorded preliminary hearing testimony of Anita Isaacs, her mother, Amy Isaacs, was questioned outside the hearing of the jury to determine the whereabouts of Anita Isaacs, the last time Anita had been seen by her mother or father, and whether or not Amy Isaacs had had any communication with her daughter (R. 193-199). Amy Isaacs testified that she had not been in contact with or had word of her daughter for 13 months (R. 194) other than two telephone calls; one received from Anita in which Anita did not indicate her whereabouts but indicated she was not in the State of Ohio (R. 194), and another from a California social worker who indicated that Anita was trying to obtain welfare in California (R. 196). Mrs. Isaacs also testified that neither her husband nor any of her friends or relatives had been in any communication with Anita Isaacs, and that Anita's whereabouts were unknown (R. 195).

Counsel for defendant objected to the introduction of the recorded testimony at R. 274-275, viz:

> "The Court: Are you acquainted with the testimony about to be heard?
>
> Mr. Plasco: Your Honor, for the record, I was furnished the day before trial with a copy of a transcript that allegedly took place at a preliminary hearing in the Mentor Municipal Court on January 10,

> 1975. I have a number of objections to the admissibility of said transcript into evidence, or being read to the jury in the present case at bar.
>
> The Court: Proceed.
>
> Mr. Plasco: Thank you, your Honor. To begin with, I'm objecting to the constitutionality of Ohio Revised Code Section 2945.49. The general purpose of a preliminary hearing is a discovery tool where the defense attorney attempts to get information out so he can best represent his client. It is not to eliminate hearsay. Many times hearsay evidence is intentionally left in so the defense attorney can get more information. * * *"

Defendant's counsel continued his objections through R. 277, specifically stating therein:

> "Mr. Plasco: I further object your Honor, * * *
>
> * * * * *
>
> For these reasons, we would strongly object to the admissibility of the transcript as being prejudicial to Mr. Roberts' rights in violation of the U.S. Constitution—confrontation of witnesses, allowing hearsay testimony into evidence. Thank you."

Although the trial judge did not specifically overrule defendant's objections, he did say, at R. 278:

> "The Court: That's the danger that you take when you conduct a fishing expedition in a preliminary, instead of going by the new rules providing for discovery. Proceed, Mr. Perez?
>
> Mr. Perez: Proceed with argument, or proceed with—
>
> The Court: With your transcript."

The defendant was found guilty by the jury on counts of forgery, receiving stolen property, and possession of heroin, and subsequently appealed the convictions to the Lake County Court of Appeals on the question presented herein. The Court of Appeals reversed the judgment of the trial court on the grounds that the admission of the preliminary hearing testimony violated the defendant's Sixth Amendment right to confrontation of witnesses, and because the State had failed to make a sufficient effort to locate the missing witness.

After allowing a motion filed by the State of Ohio to certify the record, the Ohio Supreme Court affirmed the judgment of the Court of Appeals. The Ohio Supreme Court held, as a matter of state law, that the language of the statute, "whenever the witness . . . cannot for any reason be produced," is satisfied by a showing that the witness has disappeared; that her whereabouts were entirely unknown.

But by a 4-3 majority, the Ohio Supreme Court affirmed the reversal of the conviction, holding that notwithstanding several U.S. Supreme Court decisions *contra*, the confrontation clause of the Sixth Amendment was offended in this situation because the witness was not actually cross-examined.

It is from the judgment of the Ohio Supreme Court that the State of Ohio seeks a writ of certiorari.

ARGUMENT

I.

In several decisions[1] during the past decade, this court has reviewed the import and effect of the confrontation clause of the Sixth Amendment to the Constitution of the United States on the use of various types of out-of-court statements sought to be introduced in criminal cases.

There is no need in this petition to cite authority for the proposition that the Sixth Amendment is applicable to the states via the Fourteenth; nor are cases necessary to support the proposition that the confrontation right is to be measured by the same standard in both federal and state prosecutions.

But what must be cited here is the common thread linking all the recent "confrontation cases"—the theory that the confrontation right is satisfied provided counsel for a criminal defendant has an *opportunity* to cross-examine the witnesses against his client.

In *Pointer v. Texas, infra* at fn. 1, the state introduced at a criminal trial the transcript of testimony given at a preliminary hearing of the case. The witness who had given the preliminary hearing testimony had moved out of the state and was unavailable to testify at trial. The defendant, who was unrepresented at the preliminary hearing, was not given the opportunity to cross-examine the witness.

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1. *Mancusi v. Stubbs*, 408 U.S. 204, 33 L. Ed. 2d 293, 92 S. Ct. 2308 (1972); *Dutton v. Evans*, 400 U.S. 74, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970); *California v. Green*, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970); *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1966); *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

This court held, at 380 U.S. 407-408, 13 L. Ed. 2d at 928:

> "Because the transcript of (the witness') statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate *opportunity* to cross-examine the witness, its introduction in a federal court in a criminal case against Pointer would have amounted to a denial of the privilege of confrontation guaranteed by the Sixth Amendment." (Emphasis added.)

In *Barber v. Page, supra* at fn. 1, Barber's co-conspirator inculpated him during testimony at the preliminary hearing. Barber's attorney had every opportunity to, but did not, cross-examine.[2] By the time of Barber's trial, the co-conspirator was incarcerated in a federal prison 225 miles away from the trial forum, and in another state. The prosecution knew of the co-conspirator's location, but made no attempt to bring him to testify, relying instead on a transcript of the preliminary hearing testimony. This court reversed the conviction.

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2. This was the situation herein. Counsel for defendant had called Anita Isaacs to testify at the preliminary hearing and was surprised by her incriminating testimony of his client. He had every opportunity to ask the court to declare the witness hostile and proceed to cross-examine, but did not. Whether a witness is declared hostile or not is within the sound discretion of the trial court. *State of Ohio v. Parrott*, 27 Ohio St. 2d 205, 56 Ohio Ops. 2d 124, 272 N.E.2d 112, *cert. den.* 405 U.S. 1040, 31 L. Ed. 2d 580, 92 S. Ct. 1306 (1971); *State of Ohio v. Minneker*, 27 Ohio St. 2d 155, 56 Ohio Ops. 2d 97, 271 N.E.2d 821 (1971), citing, at 27 Ohio St. 2d 158, 271 N.E.2d 824; *United States v. Duff*, 332 F.2d 702 (C.A. Mich., 1964) and 98 C.J.S. Witnesses, section 368, fn. 86, p. 120. Counsel for defendant, by not asking the court to declare Anita Isaacs hostile, thus did not ask the court to exercise its discretion. This failure on the part of defense counsel cannot be imputed to the state.

It noted, at 390 U.S. 722, 20 L. Ed. 2d 258:

> "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. E. g., *Mattox v. United States, supra* (witnesses who testified in original trial died prior to the second trial). This exception has been explained as arising from necessity and has been justified on the ground that the *right of cross-examination initially afforded* provides substantial compliance with the purposes behind the confrontation requirement. See 5 Wigmore, Evidence Sections 1395-1396, 1402 (3d ed 1940), C. McCormick, Evidence Sections 231, 234 (1954)." (Emphasis added.)

Barber turned on the failure of the State of Oklahoma to expend the minimal effort needed to secure the presence of the co-conspirator, a failure which correctly justified reversal. And on those facts, this court observed, at 390 U.S. 725-726, 20 L. Ed. 2d 260:

> "While there may be some justification for holding that the *opportunity* for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." (Emphasis added; footnotes omitted.)

In *California v. Green, supra* at fn. 1, a similar transcript was introduced to impeach a witness whose trial testimony was far less favorable to the prosecution than the same witness' preliminary hearing testimony. The California Supreme Court reversed the conviction of Green, holding that a state statute which authorized such introduction of recorded preliminary hearing testimony violated the

confrontation clause.[3] This court said, at 399 U.S. 153, 26 L. Ed. 2d at 494:

> "The California Supreme Court construed the confrontation clause of the Sixth Amendment to require the exclusion of (the witness') prior testimony offered in evidence to prove the State's case against Green because, in the court's view, neither the right to cross-examine Porter at the trial concerning his current and prior testimony, nor the *opportunity to cross-examine Porter at the preliminary hearing* satisfied the commands of the Confrontation Clause. We think the California court was wrong on *both* counts." (Emphasis added.)

Green admittedly involved a situation where the witness whose prior recorded testimony was used was present at trial and not unavailable as in *Pointer* and the case herein. But this court found such a distinction not to be relevant at 399 U.S. 165, 26 L. Ed. 2d 501:

> "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had *every opportunity* to cross-examine Porter as to his statement; and the proceedings were

3. A highly analogous situation is present in this case, where the Ohio Supreme Court has severely limited the applicability of a similar state statute on identical grounds.

> conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced." (Emphasis added.)

In *Dutton v. Evans, supra* at fn. 1, a federal habeas corpus action, out-of-court incriminatory statements made by a co-conspirator about the defendant were testified to by a second co-conspirator. The second co-conspirator was then cross-examined by defendant's counsel. It was alleged that introduction of this hearsay violated the confrontation clause. This court held otherwise, noting the strong case against the defendant and the probable harmless nature of the error, if any. (Blackmun, *J.*, concurring).

Mr. Justice Harlan, concurring in the result, noted significantly at 400 U.S. 95, 27 L. Ed. 2d 230:

> "If one were to translate the confrontation clause into language in more common use today, it would read: 'In all criminal prosecutions, the accused shall enjoy the right to be present and (the right) to cross-examine the witnesses against him.' "

And even in his dissent, Marshall, *J.*, notes, after reviewing the pertinent cases at 400 U.S. 103, 27 L. Ed. 2d 235:

> "The teaching of this line of cases seems clear: absent the *opportunity* for cross-examination, testimony about the incriminating and implicating statement made by Williams was constitutionally inadmissible in the trial of Evans." (Emphasis added.)

The plurality opinion in *Dutton, supra*, notes that the basic test of admissibility of *any* out-of-court statement is the "indicia of reliability"[4] regarding the statement.

In *Mancusi v. Stubbs, supra* at fn. 1, this court held, at 408 U.S. 216, 33 L. Ed. 2d 303:

> "Since there was an adequate *opportunity* to cross-examine (unavailable witness) Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " (Citing *Dutton.*)[5] (Emphasis added.)

II.

Despite all of the cases cited above—and the common concept in each that *opportunity* for cross-examination is the gravamen of the confrontation clause—the Ohio Supreme Court chose to hold that without *actual* cross-examination, the transcript of unavailable witness' testimony could not later be used.[6] The Ohio Supreme Court

4. 400 U.S. at 88-89; 27 L. Ed. 2d 227.

5. The only factual differences between *Stubbs* and the case herein are that (1) the opportunity for cross-examination existed at trial in *Stubbs* but at a preliminary hearing herein, and (2) that counsel for defendant availed himself of that opportunity in *Stubbs*. See fn. 2, *supra*. Yet the preliminary hearing was "a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." See *Pointer, supra* at 399 U.S. 165, 26 L. Ed. 2d 501.

6. The syllabus to the opinion in the Ohio Supreme Court reads:

> "Where a witness, who testified against defendant at preliminary hearing and was not cross-examined, is later shown to be unavailable to testify at the trial, the Sixth Amendment to the United States Constitution precludes the state's use of the witness' recorded testimony, notwithstanding R.C. 2945.49."

chose to base its decision not upon any state grounds, but rather on the confrontation clause of the Sixth Amendment to the Constitution of the United States.[7]

Since the Ohio Supreme Court has thus decided a federal question of substance in a way probably not in accordance with the applicable decisions of this court, sound discretion should be exercised to grant certiorari herein.

Respectfully submitted,

JOHN E. SHOOP
Prosecuting Attorney for the State of Ohio
Lake County Court House
Painesville, Ohio 44077
(216) 352-6281
Attorney for Petitioner

MARVIN R. PLASCO
301 Parkhill Professional Building
35100 Euclid Avenue, No. 301
Willoughby, Ohio 44094
(216) 951-8111
Attorney for Respondent

7. Since the original objection to the use of the transcript of Anita Isaacs' testimony at trial, much has been made of the notion that a preliminary hearing should be a discovery tool for the defense. See Statement of the Case, *supra*, at 4. The Ohio Supreme Court made much of this notion in their opinion at 55 Ohio St. 2d 196. But as the trial judge correctly noted, *supra*, at 4, the time and manner of discovery is set forth in Ohio's Rules of Criminal Procedure. And the dissent of the Ohio Supreme Court correctly noted, at 55 Ohio St. 2d 200: "The extent of cross-examination, whether at a preliminary hearing or at trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

APPENDIX

OPINION OF THE OHIO SUPREME COURT

(Decided July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

Where a witness, who testified against the defendant at preliminary hearing and was not cross-examined, is later shown to be unavailable to testify at the trial, the Sixth Amendment to the United States Constitution precludes the state's use of the witness' recorded testimony, notwithstanding R. C. 2945.49.

APPEAL from the Court of Appeals for Lake County.

The Mentor police arrested the defendant, Herschel Roberts, on January 7, 1975, and charged him with forging a check in the name of Bernard Isaacs, and with receiving stolen property, namely, a number of credit cards belonging to Bernard Isaacs and his wife, Amy.

On January 10, the defendant came before the Mentor Municipal Court for preliminary hearing. At the hearing,

the defendant offered the testimony of Anita Isaacs, the daughter of Bernard Isaacs. She testified that she had become friends with her classmate's younger sister, who was Roberts' girl friend, and that she had seen Roberts occasionally since June or July of 1974. On December 23, 1974, she had given the key of her apartment to Roberts' girl friend, and had told her it would be all right if she and Roberts used the apartment while she was away for the next few days. When she returned on December 30, Roberts said he was having trouble finding a place to stay, so she let Roberts go on using the apartment while she stayed at the home of a friend. She never spent any time in her apartment with Roberts.

Having thus described her acquaintance with Roberts, the witness denied ever having given him her parents' credit cards, and she denied ever having talked to him about giving him the credit cards to help him pay for a television. Roberts' attorney did not ask to have the witness declared hostile, and he did not ask to examine her as on cross-examination.

The Municipal Court bound Roberts over to the grand jury which indicted him for receiving stolen property, R. C. 2913.51, and forgery, R. C. 2913.31. The grand jury also returned a secret indictment against Roberts for receiving stolen property, namely, silverware and appliances belonging to Mr. and Mrs. Isaacs, and for possession of heroin, R. C. 3719.09. The Court of Common Pleas of Lake County consolidated the proceedings on the two indictments and set the trial for July 17, 1975.

The case was continued six times, and the trial finally took place on March 4, 1976. Between November 1975, and February 1976, the trial court issued five subpoenas for four different trial dates to Anita Isaacs at her parents'

address. It is undisputed that the last three subpoenas, showing returns on December 10, 1975, February 3, 1976, and February 25, 1976, respectively, all carried instructions to "please call before appearing." The witness never telephoned, nor did she appear at the trial.

At the trial, the prosecutor and the defense attorney both questioned Amy Isaacs on *voir dire* to determine whether Anita Isaacs was available to testify. Mrs. Isaacs testified that at the end of January 1975, Anita had left home for Tucson. She said that in April or May, she had received a form from a welfare office in San Francisco stating that Anita had applied for welfare. Mrs. Isaacs had used the address on the form to locate the social worker who was dealing with Anita. She had then talked to the social worker by telephone, and had spoken to Anita by telephone that same day. Later in the summer, Anita had called her parents and had indicated that she was traveling somewhere outside Ohio. From January 1975 to the date of the trial, neither Anita's parents nor any other relative had received any other communication from Anita. Mrs. Isaacs testified that she did not know what state Anita was in, and that she did not know how to contact Anita.

Citing R. C. 2945.49,[1] the prosecutor offered to introduce the transcript of the testimony which Anita had given at the preliminary hearing on the grounds that the

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1. R. C. 2945.49. "Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony."

witness was unavailable to testify in person. The court admitted the transcript over objection. The jury convicted the defendant on all counts, and the court entered judgment.

The Court of Appeals reversed. It held that by admitting the recorded testimony, the trial court had violated the defendant's right to confront adverse witnesses, as guaranteed by the Sixth Amendment to the United States Constitution.

The cause is before this court upon the allowance of the state's motion for leave to appeal.

Mr. John E. Shoop, prosecuting attorney, and Mr. Richard J. Perez, for appellant.

Messrs. Stoneman, Plasco & Bean and Mr. Marvin R. Plasco, for appellee.

O'NEILL, *C. J.* The issue before this court is as follows: When a witness testifies against the accused at a preliminary hearing and is not cross-examined, and the witness is later shown to be unavailable to testify at the trial, may the prosecution introduce the witness' recorded testimony pursuant to R. C. 2945.49?

The confrontation clause of the Sixth Amendment to the Constitution of the United States, which applies to the states by virtue of the Fourteenth Amendment, *Pointer v. Texas* (1965), 380 U. S. 400, requires that "[i]n all criminal prosecutions, the accused shall * * * be confronted with the witnesses against him * * *." Although confrontation serves the subordinate function of letting the jury see the witness' demeanor, its main purpose is to guarantee the accused the right to cross-examine. See *Mattox v. United States* (1895), 156 U. S. 237. It has even been said that the right to cross-examine and the

right of confrontation are "the same right under different names." 5 Wigmore on Evidence, 155, 158, Section 1397 (Chadbourne Ed. 1974). Thus, if a witness who is unavailable to testify in a criminal trial has already testified against the defendant, subject to cross-examination, in a judicial proceeding concerning substantially the same issues, the main concern of the confrontation clause is satisfied, and the state may introduce the witness' prior recorded testimony. See *Mattox, supra;* Wigmore, *supra,* 90, Section 1386. If, however, the witness is available, then the state must still produce him in person so as to serve the additional purpose of showing his demeanor to the jury. See *Mattox, supra*; Wigmore, *supra,* 154, Section 1396; cf. *New York Central R. R. v. Stevens* (1933), 126 Ohio St. 395, 185 N. E. 542. If the witness is outside the court's jurisdiction, and if the prosecutor knows his whereabouts, the state may introduce his prior recorded testimony only after proving that it made a good-faith effort to obtain his actual presence. *Barber v. Page* (1968), 390 U. S. 719.

In the instant cause the appellee argues that the state failed to show a good-faith effort to produce the witness in person, as required by the rule in *Barber.* But in *Barber,* the government knew where the absent witness was. In the instant cause, the reason for the witness' unavailability was not that she was at some known location beyond the court's power of subpoena, but that her whereabouts were entirely unknown; and it is recognized that a witness who has disappeared from observation is unavailable for purposes of the confrontation clause. Wigmore, *supra,* 215, Section 1405, and cases therein cited. As a matter of state law, R. C. 2945.49, authorizing the use of prior recorded testimony "whenever the witness * * * cannot for any reason be produced," is broad enough to cover instances where the witness has disappeared.

The burden was on the state to show that the witness was unavailable by reason of her disappearance. Wigmore says that "such a disappearance is shown by the party's *inability to find* [the witness] after diligent search," but *New York Central R. R. v. Stevens, supra,* at page 405, suggests that in Ohio it is sufficient if the proponent of the prior testimony shows that "by diligence * * * [the witness'] attendance could not have been procured," at least in a civil case.

We see no reason not to follow the same rule in a criminal proceeding. We hold that in the present cause, the trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs. The last definite word of Anita's whereabouts was that she was in San Francisco in April or May of 1974. Later, her parents learned that she was "traveling" somewhere outside Ohio. From this the trial judge could reasonably infer that Anita had left San Francisco, and that it would have been fruitless for the prosecution to have contacted the San Francisco social worker in order to locate Anita. Therefore, the trial judge could properly hold that the witness was unavailable to testify in person.

Nevertheless, the trial court erred in admitting the testimony. As noted earlier, prior recorded testimony of an unavailable witness is admissible against a criminal defendant only if the testimony was given subject to cross-examination by the defendant in a judicial proceeding concerning substantially the same issues. The issues at the trial and the issues at the prior proceeding must be similar enough so that the cross-examination to which the defendant was subjected at the earlier proceeding can be held adequate for purposes of the trial.

In the cause at bar, the basic factual issues—*e. g.*, whether the defendant had stolen the credit cards—were the same. The ultimate factual issues, however, were quite different. At trial, the ultimate issue was the defendant's guilt beyond a reasonable doubt. At the preliminary hearing, in contrast, the ultimate issue was whether there was probable cause to believe that a crime had been committed and that the defendant had committed it. The difference in the ultimate object of proof makes a great difference in the defense attorney's strategy. At trial, defense counsel will cross-examine whenever he may be able to raise a reasonable doubt of the defendant's guilt. Therefore, he will often cross-examine extensively both as to the material elements of the crime charged and also for impeachment purposes. At a preliminary hearing, on the other hand, there is seldom any hope that cross-examination will persuade the judge not to bind the defendant over, and the danger of disclosing unfavorable facts to the prosecution makes extensive cross-examination risky. As the court said in *Government of the Virgin Islands v. Aquino* (C. A. 3, 1967), 378 F. 2d 540, 549, "The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case still remains in doubt * * *. Everyday experience confirms the difference [between trial and preliminary hearing], for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. Credibility is not the issue at a preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing." See, also, *California v. Green* (1970), 399 U. S. 149, 189 (Brennan, J., dissenting).

Thus, the restriction of the factual issue at preliminary hearing restricts the scope of the cross-examination which defense counsel can prudently conduct. Therefore, the mere oportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial. Accordingly, we hold that, where a witness, who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at the trial, the Sixth Amendment precludes the state's use of the witness' recorded testimony, notwithstanding R. C. 2945.49.

The holding in *Barber v. Page, supra,* requires this result. In that case, the defendant was on trial in Oklahoma for armed robbery. The state's main evidence was the recorded testimony which a certain witness had given at the preliminary hearing. The defendant's attorney had not cross-examined at the hearing. Since the witness was in prison in Texas at the time of the trial, and since the prosecution had made no effort to produce the witness in person, the United States Supreme Court held that the introduction of his prior recorded testimony violated the defendant's right of confrontation. The state argued that the defendant had waived his right to confront the witness by not cross-examining at the hearing, but the court held, at page 725, "That contention is untenable. Not only was petitioner unaware that * * * [the witness] would be in a federal prison at the time of his trial, but he was also unaware that, even assuming * * * [the witness'] incarceration, the State would make no effort to produce * * * [the witness] at trial. To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' "

The later case of *California v. Green, supra,* does not hold otherwise. There, a 16 year-old witness named Melvin Porter sold marijuana to an undercover agent, and then named Green as his supplier. Green was charged with selling to a minor. Porter testified at preliminary hearing, and was cross-examined. At trial, Porter again testified, but was evasive and uncooperative. So the prosecutor introduced Porter's prior testimony under a statute allowing statements that would otherwise have been admissible only for impeachment to be introduced also for the truth of the matter asserted. Green was convicted, and the California Supreme Court reversed, holding that the statute was unconstitutional under the confrontation clause.

The United States Supreme Court reversed, holding that the use of the prior testimony did not violate the Sixth Amendment because the declarant was available in person at the trial itself to be cross-examined as to his earlier statement. Thus, the case does not directly concern witnesses who are unavailable to testify at the trial in person. The opinion includes a dictum upon which the appellant in the present cause argues that the mere opportunity to cross-examine at preliminary hearing will always satisfy the confrontation clause.[2] The dictum, how-

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2. "We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's

(*Continued on following page*)

ever, must be interpreted in light of the facts. The preliminary hearing in *Green* was quite atypical in that the witness' "story * * * was subject to extensive cross-examination by * * * [defendant's] counsel." *Green, supra,* at page 151. Thus, the case goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial. In the instant cause, of course, the witness was never cross-examined.

Because the Court of Appeals correctly held that the use of the witness' prior recorded testimony infringed the appellee's Sixth Amendment right of confrontation, its judgment will be affirmed.

Judgment affirmed.

W. BROWN, P. BROWN and SWEENEY, *JJ.*, concur.

HERBERT, CELEBREZZE and LOCHER, *JJ.*, dissent.

CELEBREZZE, *J.*, dissenting. The majority concedes that the trial judge properly held that the witness was unavailable to testify. Nevertheless, the majority concludes that the trial court erred in admitting in evidence the prior recorded testimony presented by this witness during the preliminary hearing, at which appellee and

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Footnote continued—

absence if Porter had actually been unavailable, despite good-faith efforts of the state to produce him. That being the case, we do not think a different result should follow where the witness is actually produced.

"* * * If Porter [the witness] had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State." *California v. Green* (1970), 399 U. S. 149, at pages 165-66.

his attorney were present. This rather incongruous result is reached by indulgence in conjecture relative to the trial tactics of defense counsel, and is supported only by the highly subjective opinion that "* * * the mere opportunity to cross-examine at the preliminary hearing can not be said to afford confrontation for purposes of the trial."

The decision of the majority is not compelled by either *Barber v. Page, supra,* or *California v. Green, supra.* The holding in *Barber* was obviously based upon the state's failure to make a good-faith effort to produce its witness at trial, since the high court recognized that "* * * there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable * * *." *Barber,* at pages 725-726. Similarly, in the course of holding that the confrontation clause was not violated by admission in evidence of the prior recorded testimony of a later reluctant witness, the Supreme Court, in *California v. Green, supra,* at page 165, observed that "* * * respondent had every opportunity to cross-examine * * * [the witness] as to his statement." Furthermore, in *Pointer v. Texas, supra,* wherein the high court held that the prior recorded testimony of an unavailable witness could not be admitted in evidence at trial because counsel had not been appointed to assist the defendant at the preliminary hearing, it was noted that "* * * [t]he case before us would be quite a different one had * * * [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." *Pointer,* at page 407.

In my opinion the Sixth Amendment to the United States Constitution does not prohibit, under the facts of the instant cause, the admission in evidence of the witness' recorded testimony. As was stated in *United States v. Allen* (C. A. 10, 1969), 409 F. 2d 611, 613, "* * * the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity. * * * The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

Accordingly, I would reverse the judgment of the Court of Appeals.

HERBERT and LOCHER, *JJ.*, concur in the foregoing dissenting opinion.

JUDGMENT ENTRY OF THE OHIO SUPREME COURT

(Dated July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR LAKE COUNTY

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein.

MANDATE OF THE OHIO SUPREME COURT

(Dated July 19, 1978)

No. 77-530

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellant,

vs.

HERSCHEL ROBERTS,
Appellee.

MANDATE

To the Honorable Common Pleas Court Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

(Filed in the Ohio Supreme Court September 20, 1978)

Case No. 77-530

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,
Plaintiff-Appellant,

vs.

HERSCHEL ROBERTS,
Defendant-Appellee.

NOTICE OF APPEAL

Now comes the State of Ohio, by and through John E. Shoop, Prosecuting Attorney for Lake County, by and through Richard J. Perez, Assistant Prosecuting Attorney, and gives notice that the State of Ohio will appeal the judgment of this Court rendered July 19, 1978, to the Supreme Court of the United States, pursuant to 28 U.S.C., Section 1257(3).

Respectfully submitted,

JOHN E. SHOOP
Prosecuting Attorney

/s/ RICHARD J. PEREZ
Assistant Prosecuting Attorney
Lake County Court House
Painesville, Ohio 44077
Telephone: 352-6281, Ext. 281

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. mail, postage prepaid, to counsel for the defendant, Marvin R. Plasco, Esq., 35100 Euclid Avenue, Willoughby, Ohio 44094, this 13th day of September, 1978.

/s/ RICHARD J. PEREZ

Assistant Prosecuting Attorney